

S. Grundmann and J. Stuyck, An Academic Green Paper on European Contract Law

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Book Review: Stefan Grundmann and Jules Stuyck (eds.), *An Academic Green Paper on European Contract Law*, Kluwer Law International, 2002, xxiv + 432 pages, hardback, €125.00, US\$120.00.

1. Introduction

On 11 July 2001 the European Commission published its Communication on European Contract Law.¹ This Communication led the K.U. Leuven and the Society of European Contract Law (SECOLA) to hold a conference later that year in Leuven, with the Communication as its central theme. *An Academic Green Paper on European Contract Law* is the product of that conference and contains the contributions of the conference speakers, sometimes in revised and expanded form, together with a general introduction by the book's editors and a contribution by Staudenmayer (European Commission) who as chair of the committee that prepared the Communication was responsible for its inception.

Prior to discussing the individual contributions published in this book (3), we will first pay some attention to the relevance of the Commission's Communication on European contract law (2). In order to be able to discuss the book adequately, we find it necessary to address the significance of the Communication as such. In addition we will analyze and evaluate the strengths and weaknesses of this book (4). This will also include a brief look at some recent developments in the area of European contract law, which could impact on the overall evaluation of this book.

2. The Communication on European Contract Law

EC involvement in the field of private law, was until recently relatively limited. That is not surprising since the EC may only act if it has a legal basis to do so, and its competence is closely related to the objectives highlighted in Articles 2 and 3 of the EC Treaty. The most relevant objective for private law, relates to the establishment and functioning of the internal market and the overwhelming majority of directives concerning issues of private law have been promulgated on the basis of that objective (elaborated in Article 95 of the EC Treaty), sometimes in combination with another aim (for instance consumer protection). The reasoning is usually the same: the existence of different national laws leads to a distortion of competition between businesses and therefore necessitates harmonization. The truth of this premise forms the subject-matter of many contributions in *An Academic Green Paper on European Contract Law*.

The most important objection to harmonization by directives is that it leads to fragmentation. Unlike the classical codifications, which (systematically) cover the whole range of private law, European harmonization takes place thematically, depending on which specific topics emerge on the political agenda at a certain point in time, i.e. it is piecemeal. The European Parliament was quick to object to this method of harmonization, already calling for the Commission and the Council to commence preparatory work on the creation of a 'European Private Law Code' in 1989² (and again in 1994³). This call was not answered until 1999, when the Tampere European Council devoted a paragraph in its Presidency Conclusions to 'Greater convergence in civil law' in the context of creating a 'genuine European Area of Justice'. In its declaration, the European Council requested a 'study ... on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings.'⁴ The significance of this request lies in the fact that nearly all the

¹ COM (2001) 398 final, [2001] OJ C255. Also available at http://europe.eu.int/comm/consumers/policy/developments/contract_law/cont_law_02_en.pdf.

² Resolution A2-157/89, [1989] O.J. C158/400.

³ Resolution A3-0329/94, [1994] O.J. C205/518. Also see Resolution B5-0228, 0229-0230/2000, 326 at point 28, [2000] OJ C377/323.

⁴ SI(1999) 800, no. 39. At the Laken European Council (December 2001:SN 300/1/01 REV 1, no.45) only a brief mention was made to overcoming the differences between legal systems.

initiatives of the European Council are eventually implemented.⁵ The Communication of 2001 is the direct consequence of these calls from the European Parliament and the European Council.

The Commission's Communication launched a public consultation, the aim of which was to provoke reactions from governments, businesses and other European stakeholders about the future development of contract law in Europe. The Communication poses two central questions: 1. do the existing differences in contract law lead to problems; and 2. what should a future European contract law look like?⁶ Assuming an affirmative answer would be given to the first question, the Commission sketched four scenarios for its second question. These scenarios comprise no action on the part of the EC (option I), promoting the development of common principles of contract law (option II), improving the quality of existing legislation (option III) and the promulgation of comprehensive legislation at EC level, either as a European code replacing national law (option IVa) or as an optional European code (option IVb). The Communication, which clearly placed the future of contract law in Europe on the political agenda, must be seen as a first discussion piece that has the specific objective to widen the debate on European contract law to legal practice and the Member States. This is important since the discussion on European private law was until 2001 still predominantly of an academic nature.

3. The Contributions

An Academic Green Paper on European Contract Law is one of the responses from academia to the Commission's Communication. It comprises 26 contributions, in which the authors attempt to provide an answer to (one of) the questions posed by the Communication. The contributions are divided into four parts, focussing in particular on options III, IVa and IVb.

Part I contains a general introduction by the editors Grundmann and Stuyck, who provide an account of the Leuven conference and summarize the contributions in the book. This is followed by a contribution by Staudenmayer, who further explains the Communication on European Contract Law and places it within a wider framework. He stresses that the strength of the Communication is predominantly to be found in the fact that it has launched a political discussion but that it is also the first step in a decision-making process.

Part II addresses option III of the Communication - the improvement of the *acquis communautaire*. The contributions (critically) analyze and evaluate the adopted methods of harmonization and existing European contract law legislation. SCHWARTZE commences the discussion by addressing the need for more thorough empirical research. He pays attention to the frequently heard assumption that differences in national laws negatively affect cross-border trade. It is namely argued that cross-border trade is hindered by extra (transaction) costs when compared to purely domestic transactions. According to Schwartz, the extra costs are mainly expenses for information that are spent by the parties to reduce uncertainties concerning the legal basis of the transaction.⁷ Nevertheless it remains unclear whether the assumption is correct. In light of this, the Communication asked interested parties to provide concrete examples of cases in which businesses and consumers have not contracted, or have done so at higher costs, because of the diversity of law. Schwartz argues however that examples are not enough. He pleads for more thorough empirical research before commencing further harmonization initiatives and invites in particular economists to become involved in this.

In Section B of Part II, Beale, Howells and Tilleman and Du Laing look at the shortcomings of existing harmonization methods and try to identify ways to enhance contract law harmonization. BEALE argues that even though diversity of laws leads to additional transaction costs, harmonization also brings considerable costs with it, e.g. in the form of a loss of flexibility. He does however

⁵ See D. Staudenmayer, 'The Commission Communication on European Contract Law: What Future for European Contract Law?' 10 *European Review of Private Law* 2 (2002), 252.

⁶ Communication on European Contract Law, no. 15.

⁷ A. Schwartz, 'Design for an Empirical Data Investigation into the Impact of Existing Contract Law Harmonisation under the White Paper of 1985', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, (Kluwer Law International, 2002), 59.

consider it desirable that there are not 'major traps in doing business across borders'.⁸ Beale puts the importance of a uniform contract law for cross-border transactions into perspective, by emphasizing, with regard to consumer transactions, the relevance of language, different cultural arrangements and of legal enforcement. He also suggests that businesses are unlikely to worry about the details of the law on the other side provided they reach a broad understanding.⁹ HOWELLS proposes a major review of current substantive EC private law with a view to enhancing consumer protection. He also suggests looking at and learning from the problems of the implementation process in the member states. TILLEMAN and DU LAING ask that attention be given to the - negative - effects of the directives on national contract law. Firstly, they point to the lack of internal coherence in the European directives and suggest that it would be wise to adopt uniform notions and wordings. Secondly, they comment that European directives appear to have a fragmenting influence on national contract laws, because of the piecemeal harmonization and the focus on consumer contracts. Consequently, an 'unjustified dual legal regime of 'consumer' and 'non-consumer' contracts' develops in the member states.¹⁰ They also identify fragmentation at a second level, namely that of the internal coherence of consumer(-oriented) law itself: 'In some cases, ... consumers are left with a choice between, on the one hand, (general) national rules that already existed before the adoption of the Directive, and, on the other hand, (specific) rules resulting from the implementation of the Directive into national law.'¹¹ They conclude that there should be a critical reflection of past achievements before embarking upon the codification of private law as a whole.

Part II finishes with a contribution by DREXL who concludes that minimum harmonization does not work because it allows disparities in national law to persist and thus adversely affects the functioning of the internal market.

Part III contains contributions which portray vastly differing opinions on the question whether European legislation (in the form of a European Civil Code of Contract law) should replace national law. Following MASSIMO BIANCA's initial call for a progressive codification, Von Bar, Basedow, Bussani, Gandolfi, Lando and Mattei argue (more or less) in favour of a European code replacing national law. Although Hesselink and Schwintowski appear from the division in the book to support a code replacing national law, from their contributions it becomes apparent that they in fact do not favour such a code. These contributions (and especially the latter) provide a clear illustration of the inconsistency between the viewpoints and the artificial divisions that are sometimes apparent in the book. Consequently, it is difficult to make a consolidated summary of the contributions of part III. In addition the contributions vary in scope, style and theory.

VON BAR calls for greater co-operation (and less competition) among academics in the search for a common contract law: 'Let us build a new common law for our old continent, and let us do it together.'¹² He further promotes, as does LANDO in his contribution, the work of the Study Group on a European Civil Code (the successor to the Lando Commission, the group responsible for drafting the Principles on European Contract Law) and suggests that these principles could serve as a precursor to a code. Similarly, GANDOLFI proposes a continuation of the existing processes to (eventually) come to a uniform European contract law and thus promotes his own Gandolfi code. BASEDOW outlines the arguments in favour of a European Code replacing national law. Firstly, he provides an economic reason: divergence in the national contract laws stands in the way of the proper functioning of the internal market. In addition he mentions cultural and political reasons, which relate to the current nationalist legal education and the professional consciousness of lawyers: 'A European Contract Act would be of fundamental use in creating a common conception of civil law on the part of jurists, and

⁸ H. Beale, 'Finding the Remaining Traps Instead of Unifying Contract Law', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 72.

⁹ *Ibid.*, 71.

¹⁰ B. Tilleman and B. Du Laing, 'Directives on Consumer Protection as a Suitable Means of Obtaining a (More) Unified European Contract Law?' in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 82.

¹¹ *Ibid.*, 86.

¹² C. Von Bar, 'Paving the Way Forward with Principles of European Private Law', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 145.

above all on the part of students of law.’¹³ BUSSANI pays attention to the far-reaching fragmentation of the different types of contract within European contract law. Identifying four contract types - consumer contracts, employment contracts, commercial contracts and ‘ordinary’ contracts - he asks which should be addressed in the codification process. He fears that the codification of commercial contracts in a European context could result in a ‘mere rhetorical exercise’ since ‘business contract law in practice is becoming more and more the law set out in long contracts written by American or English lawyers in the English language and arbitrated or litigated under American or English law.’¹⁴ He suggests that the ‘ordinary’ contract should be the main target of codification. Two possible options for codification are outlined: a single-level code (an all-inclusive classical codification) and a double-level code, which would contain a set of provisions dealing with consumer and ‘ordinary’ contracts. The second codification aim could be the production of a sort of Business Contracts Code, which would restate and ‘Europeanize’ the rules of international commercial transactions.¹⁵ HESSELINK makes an inventory of stakeholders in the harmonization debate and their political agendas. Hesselink does not appear to be a clear proponent of a code replacing national law, favouring much more openness and flexibility instead. MATTEI forcefully rejects the soft, ‘post-modernist’ approach to European codification in the form of restatements, models, legal science and competition options. He argues that ‘the new European Code should be hard, minimal, not limited to contracts and process-oriented. It should aim to reflect the social fabric of European capitalism. The European codification process should look beyond the frontiers of Fortress Europe and locate itself in the global dynamic of law-making.’¹⁶ This minimalistic, hard code should only contain ‘fundamental principles that can readily be used by the courts to force market actors to internalise social costs.’¹⁷ Hard action is needed, in his view, to keep economic activity under control. SCHWINTOWSKI supports a European framework codification, limited to the essentials, which exists next to and not in the place of the contract law of individual member states. He regards a European civil code, next to the Euro, as ‘a superb opportunity to give the European idea another visible and meaningful symbol.’¹⁸

In Part III, Section C, the opponents of a European code replacing national laws take the floor. VAN DEN BERGH makes an analysis of the costs and benefits of harmonization and concludes that the ‘reduction of information costs’ argument should not be too readily accepted as justifying the harmonization of contract law. The benefits of reduced transaction costs have not been quantified and the costs of harmonization (e.g. administrative costs of legal change and the disadvantages of reduced diversity) largely go unnoticed. Furthermore, the advantages of competition between legal rules must also not be underestimated. Van den Bergh, concluding that ‘there are no convincing economic reasons for harmonisation of contract law’¹⁹, thus argues in favour of spontaneous, decentralized harmonization, which allows the process of competition to determine whether harmonization is ultimately necessary. COLLINS argues that there should be a broader political debate on harmonization, which does not only focus on ‘obstacles to trade’, which has become the Communication’s central reference point, due to the subsidiarity principle. He concludes that the differences in contract law do not form the most significant obstacles to inter-state trade, instead ‘the source of these barriers is primarily to be discovered in the diversity of social rather than legal norms, so that legal intervention is unlikely to prove productive.’²⁰ Although, Collins does not deny that harmonized law could reduce

¹³ J. Basedow, ‘The Case for a European Contract Act’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 153.

¹⁴ M. Bussani, ‘The Contract Law Codification Process in Europe: Policies, Targets and Time Dimensions’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 163.

¹⁵ *Ibid.*, 166.

¹⁶ U. Mattei, ‘Hard Minimal Code Now - A Critique of ‘Softness’ and a Plea for Responsibility in the European Debate over Codification’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 215.

¹⁷ *Ibid.*, 229.

¹⁸ H. Schwintowski, ‘The European Civil Code: A Framework Code Only’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 246.

¹⁹ R. Van Den Bergh, ‘Forced Harmonisation of Contract law in Europe: Not to be Continued’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 263.

²⁰ H. Collins, ‘Transaction Costs and Subsidiarity in European Contract Law’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 281.

transaction costs in (commercial) transactions, he emphasizes the need for legal certainty and predictability as well as quality of the rules. Instead of developing general principles, harmonization should take place case-by-case.

The final contribution in Part III is by REICH, who criticizes the Communication for not considering issues, such as whether the European legislator has a general competence in the field of contract law. Also he views the methodological foundation of the communication as incomplete. Concluding that the EC does not have competence to promulgate a code, Reich proposes the consolidation of existing European (consumer) law.

Part IV provides varying perspectives on an optional European Code that supplements, but does not substitute, national law. In a lengthy contribution, GRUNDMANN and KERBER, discuss potential design alternatives and elements to evaluate them. They propose a 'European system of contract laws' in order to combine the advantages of both centralized and decentralized contract law. Grundmann and Kerber thus propose combining both types of rule-making in a 'two level system of contract laws' encompassing legal rules on the EU level, legal rules on the level of the Member States and conflict rules.²¹

Drobnig, Wilhelmsson, de Geest and Smits then each present possible design proposals. DROBNIG argues for a code that - like the CISG - would exclusively be applicable to cross-border transactions. WILHELMSSON compares the discussion on harmonization of private law in Europe with an American soap and regards the Commission as the 'new hero', introduced to liven up the debate. However, he criticizes the Commission for not taking account of the dialogue that has already taken place among the established cast (of academics). Wilhelmsson fears that a future code will incorporate 'traditional liberal values', will have a static character and will weaken the prevailing European identity (plurality of languages, culture and law). He prefers a dynamic, 'welfarist' restatement which uses real-life language, rather than abstract legal-technical language and concepts. DE GEEST wants to reduce transaction costs whilst retaining competition. His solution is a new type of codification: 'extremely detailed international standard codes'. Member States will still be able to deviate from every rule, provided they make such an exception highly predictable, transparent and that the information is freely accessible. SMITS draws attention to diverging tendencies in European contract law - 'contract law is more characterised by diverging tendencies than by a tendency of generalisation'²² - providing four illustrations to support his finding. Firstly, he points to the fragmenting influence of directives on national law: 'This harmonisation leads away from any generalising approach because contract at the national level is ever less governed by general principles and subdivided into separate parts, each having their own rules.'²³ Secondly, he sees two types of contracts developing in the law, each with their own rules: the consumer contract and the commercial contract. Finally he points to the diversity of sources of European private law and to the impact of multiculturalism, which also have diverging tendencies. Under these circumstances, Smits prefers a multi-layered optional code, which contains specific sets of rules for different types of contract. These sets should preferably be chosen by the contracting parties and are applicable to both domestic and cross-border transactions.

KIRCHNER regards an optional code as intellectually challenging, but questions whether there is an incentive for parties to use it. He suggests changing Article 5(2) of the Treaty of Rome which provides a consumer with the choice of (the most favourable) law option after the conclusion of the contract. Kirchner proposes that the choice for either the optional code or national law must be exercised upon conclusion of the contract. The consumer will be benefited 'by the price differential which is being made possible by real transaction cost reductions.'²⁴

²¹ S. Grundmann and W. Kerber, 'European System of Contract Laws - a Map for Combining the Advantages of Centralised and Decentralised Rule-making', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 305.

²² J. Smits, 'Toward a Multi-Layered Contract Law for Europe', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 388.

²³ *Ibid.*, 389.

²⁴ C. Kirchner, 'An Optional European Civil Code (OECC): Initiating a Learning Process', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 403.

An Academic Green Paper on European Contract Law concludes with a contribution by VAN GERVEN who outlines how the codification of European contract law should proceed. He discusses, the necessary institutional and political framework and supports the creation of an independent European Law Commission.

4. Evaluation

The Commission's Communication is a discussion piece intended to stimulate debate on the future of European contract law. *An Academic Green Paper on European Contract Law* illustrates that the Communication contains much 'food for thought' and that the debate can take off in various directions. The book provides a collection of highly interesting contributions from leading academics, who, each in their own way, attempt to give an answer to (one of) the two central questions posed in the Communication. The fact that these opinions are bundled in one book, allowing the reader to compare and evaluate the respective positions, makes this book a 'must read' for anyone interested in the development of contract law in Europe. Nevertheless, we do have some points of criticism.

Our first point is partially related to the method used in the book. The 26 contributions contained in this book each present a different perspective on the options provided in the Communication and the road ahead. There are often considerable differences to be found in the contributions with respect to the chosen angle, content and scope and at other times great overlaps in the themes addressed (e.g. the impact of diversity of law and fragmentation of national law). The editors have tried to structure the contributions in each part under headings (at least in the table of contents), however, this division is not always entirely clear and sometimes even contradictory. In addition, the editors try to bring some coherence in their synthesizing introduction, but this does not solve the described problem entirely. The lack of coherence is perhaps illustrative of the overwhelming differences in viewpoints of the academic community on the (future) development of contract law in the European context: there are (at the moment) no definitive answers to the two questions posed by the Commission. There are contributions to be found in the book that argue that divergence of national (contract) laws has a negative impact on inter-state trade. On the other hand, there are contributors who regard diversity positively for the flexibility it provides and for facilitating competition. What type of contract law should be harmonized is not entirely clear: contract law in general, consumer contract law, commercial contract law, or a combination of different types? For or against codification, an optional or substituting code, hard or soft law, all combinations appear possible and thus the contributions in Parts III and IV frequently overlap. What can be concluded from reading the contributions is that there is still a 'diverging tendency' and thus the need for continued work on deciding the methodology to be adopted before moving forward is stressed. A call for a clear methodology and clarification of the underlying values for harmonization has been made elsewhere.²⁵ We regret that there are no final recommendations which could guide the future action of the European institutions.

Secondly, since the publication of *An Academic Green Paper on European Contract Law*, at least three important developments have taken place in the field of European contract law: the reactions to the Communication on European Contract Law²⁶, the action plan for a more coherent European contract law²⁷ and a proposal for a directive concerning unfair business-to-consumer commercial practices²⁸ have been published. Each of these developments impacts the discussion on the future of European contract law. For instance, in its action plan, the European Commission appears to continue discussing a comprehensive European contract law, in contradiction to the viewpoints expressed in a number of contributions to this book and a (small) majority of the respondents to the Communication. These are interesting and highly relevant developments to which *An Academic Green Paper on European Contract Law* understandably could not pay attention, but which illustrate the fast pace with

²⁵ See B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Springer Verlag, 2002).

²⁶ See http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/index_en.htm.

²⁷ COM (2003) 68 final, [2003] O.J. C-63/01. Also available at http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf.

²⁸ COM (2003) 356 final. Available at http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf.

which events can progress in the field of European contract law. Nevertheless, the contributions published in this book remain important for the future discussion.

Thirdly, this book still very much reflects the academic nature of the debate (this is also indicated in the title: *An Academic Green Paper*). The contributors are all leading academics in the existing harmonization debate. What the book perhaps lacks are (more) contributions which contain reflections from the point of view of legal practice and the business community. We believe that taking into account the needs and wants of these stakeholders can provide useful insights. For example, from the reactions to the Communication, - which were published after the publication of the book - it appears that the majority of respondents from industry, retail and other commercial organizations are skeptical of the benefits of harmonization.²⁹ Businesses regard the role of (private) law as being over-valued: other obstacles, such as another culture of doing business are more important and if law is an obstacle, then it is the differences in tax law that have more impact. Although the viewpoints put forward by Beale and Collins - they put the importance of a uniform contract law for cross-border transactions into perspective - touched upon this issue, we think that some extra attention for these matters would have positively affected the academic debate in the book. This may also highlight the need for more empirical research.

Finally, we should mention the relatively high cost of the book: we find it regrettable that the publisher has placed a price tag of €125.00 on this book, especially considering that most contributions, albeit unrevised, could until recently also be accessed on the SECOLA website.³⁰

Despite these points of criticism, the contributions in this book provide a lot of 'food for thought' for anyone interested in the future of harmonization of private law in Europe. We highly recommend this book for its stimulating contribution to the discussion on the future of contract law in Europe.

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²⁹ See further J. Smits and R. Hardy, 'De toekomst van het Europees contractenrecht', 133 *Weekblad voor Privaatrecht, Notariaat en Registratie* 6513 (2002), 829.

³⁰ See <http://www.secola.org>.